

F.C.C.2d 620, 625 (1981) (Petition to Enlarge to include a misrepresentation issue properly denied where proponent failed to ask any questions regarding the alleged misrepresentation although it had the opportunity to do so during depositions); North American Broadcasting Co., 21 F.C.C.2d 631, 633 (Rev. Bd. 1970) (error existed where hearing examiner based decision on post-hearing amendment without reopening the record and allowing parties the opportunity for cross-examination).

4. Moreover, in the area of misrepresentation/lack of candor, the Commission's case precedent requires that "any conclusion of lack of candor arrived at without the designation of a specific issue be so blatant as to make any further evidentiary hearing on the matter of candor obviously superfluous." Silver Star Communications-Albany, Inc., 3 FCC Rcd 6342, 6350 (Rev. Bd. 1988), rev'd in part on other grounds, 6 FCC Rcd 6905 (1991). The NAACP's allegations of misrepresentation/lack of candor simply cannot meet this standard. In the main, they derive from the NAACP drawing sinister inferences from innocent statements and facts.

5. Thus, as a legal matter, the "misrepresentations" urged by the NAACP can have no place in this proceeding, and findings cannot be made regarding them, and conclusions cannot be based on them. However, in order to allay any possible concerns, the Church responds to the NAACP's allegations herein, citing to the appropriate paragraphs of the NAACP's Findings and Conclusions.

6. Paragraphs 1-34 of the NAACP's Findings and Conclusions recite the allegations in the HDO and try to convert these

allegations through some sort of alchemy into "findings" or "preliminary findings." This is wholly inappropriate -- the HDO merely contains unproved allegations. Cleveland Television Corp. v. FCC, 732 F.2d 962, 973 n.13 (D.C. Cir. 1984); Black Television Workshop of Los Angeles, Inc., 4 FCC Rcd 3871, 3873 (1989).

These paragraphs should therefore be stricken or disregarded by the trier-of-fact.

**Employment of Minorities (Paragraphs 35-42)**

7. In paragraph 35 of its proposed findings, the NAACP states that Lula Daniels was a minority holding a Top Four job category position at KFUD. In paragraphs 36 and 38, the NAACP names six other minorities hired during the License Term. The NAACP is correct that Ms. Daniels was an African-American woman who served as Coordinator of Worship Programming from before the beginning of the License Term until she died on April 17, 1985 (having been earlier promoted from a secretary position by Reverend Devantier). Tr. 865; Church Ex. 4, Att. 6, at 1; Church Ex. 7 at 9. The NAACP is also correct in naming six of the other minorities hired by KFUD during the License Term. The picture painted by the NAACP is incomplete, however, and is therefore misleading. This is because the NAACP fails to mention that another minority, Caridad Perez, an Hispanic woman, was hired in a Top Four job category position in March 1988. Church Ex. 4 at 12; see also Tr. 763. The NAACP also neglects to mention that an African-American woman, Ruth Clerkly, was recommended and considered for a management-level position but left KFUD's employ

before it was able to promote her. Tr. 883. In addition to these various omissions, the NAACP fails to acknowledge (among other key facts) that KFUD hired minorities at 104.5% of minority representation in the local work force during the License Term. Church's Findings and Conclusions at 30 (citing Church Ex. 4, Att. 6; HDO, 9 FCC Rcd at 917 n.6).

8. The NAACP's analysis of minority hiring by other classical music radio stations in paragraphs 41 and 42 of its findings proves little or nothing. Without far more detail, it is impossible to know whether those stations were more or less successful than KFUD in recruiting minorities. Even accepted on its face, however, it is difficult to understand the point that the NAACP is trying to make. One of the stations in the NAACP's chart, KFSD-FM (San Diego), never had an African-American in a Top Four job category during the relevant years. Many of the other stations, including KKHI-AM-FM (San Francisco), KVOD-FM (Denver), WCRB-FM (Boston), WQRS-FM (Detroit), and WFMR-FM (Milwaukee), never had more than one African-American, and had no African-Americans for some or many of the relevant years. Two other classical stations, WNIB-FM (Chicago) and KXTR-FM (Kansas City), had one African-American in a Top Four job category throughout the relevant years. KFUD's employment data compares quite favorably with the data displayed in paragraph 42 of the NAACP's Findings and Conclusions. See NAACP Ex. 24; Church Ex. 4 at 12; Tr. 763; Church Ex. 4, Att. 6; Church's Findings and Conclusions at 30.

**Applications from Minorities (Paragraphs 43-47)**

9. The NAACP's discussion of KFUE's minority applicants in paragraphs 43 to 47 is argumentative and misleading. The NAACP's point appears to be that not many African-Americans applied for jobs at KFUE and that African-Americans applied only for certain openings. The NAACP's attempt to place a sinister light on the racial composition of KFUE's applicant pools is, however, unfair for a number of reasons. First, as the NAACP acknowledges in the cases of Ms. Clerkly, Ms. Richardson and Ms. Harrison, KFUE did not retain records of many of the applicants for numerous jobs during the License Term, so it is impossible for the NAACP to draw conclusions on the theory that an absence of records of minority (or any other) applicants indicates that KFUE had no minority applicants.<sup>1/</sup> Second, the NAACP falsely states that the "applicant pool" for Cynthia Blades' position consisted of three minorities when the truth is instead that three minorities were interviewed. Church Ex. 4, Att. 6. Third, the NAACP acknowledges that even based on the records that the Church retained, there were both minority and non-minority applicants for certain positions, including the positions for which Bridget

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<sup>1/</sup> As explained in the Church's initial proposed conclusions, the Commission did not begin to place heavy emphasis on documentation until 1987, and many licensees did not keep records prior to the Commission's amended EEO Rule adopted that year. Church's Findings and Conclusions at 93-94. Contrary to the NAACP's suggestion, Dennis Stortz did not testify that there were no African-American applicants for management positions, but only that he did not recall any such applicants and could not say for certain one way or the other. Tr. 514.

Williams and Timothy Meeks were hired. NAACP's Findings and Conclusions at 20. It is inaccurate and unfair to propose a factual finding on this record that certain applicant pools were somehow confined to minorities. Fourth, and most fundamental, it is sheer hyperbole for the NAACP to argue that there were some sort of "set-aside" positions for minorities. To point only to the most obvious facts to the contrary, the NAACP ignores Ms. Daniels' long-term role in a Top Four job category position, the hiring of Ms. Perez for a sales position, and the consideration of Ms. Clerkly for a management position. See ¶ 7, supra. The NAACP does not and cannot point to any record evidence that shows any intention by KFUE's management -- i.e., by people of demonstrated commitment to equality such as Reverend Devantier and Dennis Stortz -- to "set aside" jobs for minorities, and it is irresponsible to make such an allegation on this record.

**KFUE's Written EEO Policies (Paragraphs 48-50)**

10. The NAACP's discussion of KFUE's written EEO policies in paragraphs 48-50 of its proposed findings reflects a misunderstanding of the record evidence. As the Church reads the NAACP's proposed findings, the implication is that KFUE had no written EEO policy until 1986. Nothing could be further from the truth. This is obvious from the fact that the Church submitted KFUE's EEO policies in effect from 1983 to 1986-1987, which required employment on a racially non-discriminatory basis and also contained a commitment to affirmative action. Church Ex. 4, Att. 3; Church Ex. 4 at 5.

11. A new EEO policy was formulated after a reorganization of the Church's Broadcast Ministry in January 1986 placed KFUD directly under the control of the Church's Board of Communications Services. Church Ex. 4, Att. 4; see Church Ex. 4 at 5-6, 11; Church Ex. 7 at 7-8. The Church does not understand why the NAACP believes that this second EEO policy should have gone into effect earlier, and the Church is frankly mystified as to why the NAACP believes that Reverend Devantier should have "spoken" about this timing, or that his "failure" to have done so has some significance.

12. The NAACP's attempt to place some significance on the placement of the EEO policy in the Church's Employee Handbook is entirely unfair. The NAACP never asked any witness at hearing why the EEO policy was placed in an appendix and it is pure speculation to argue that this placement has any significance. It is surely just as likely that the Church intended to highlight the issue by placing it in a separate appendix as to believe that this placement represented some sort of denigration of EEO. In any event, the point is that there is no evidence of any significance to the matter in the record, and it is irresponsible for the NAACP to make any argument about significance on this record.

13. The NAACP's speculation about the significance of the placement of the EEO Policy is yet another example of the "sandbagging" in which the NAACP has participated. The NAACP has taken materials such as KFUD's Employee Manual from the record, asked no questions about the documents at hearing, and then

concocted arguments that the most innocent matters -- the placement of a policy in a long document -- somehow show discriminatory animus. This is entirely improper. If the NAACP believed that something such as the placement of a policy in a document was significant, it surely had an obligation to ask about the matter and to give the Church the opportunity to respond. See ABC Air Freight Co. v. C.A.B., 391 F.2d 295, 305 (2d Cir. 1968), cert. denied, 397 U.S. 1006 (1970) ("It is exceedingly dangerous business -- indeed under some circumstances a denial of the fair hearing required by the APA -- for an agency to seize upon a single exhibit in a large record, introduced for a limited and hardly controversial purpose, and make this an important basis for decision without benefit of cross-examination, rebuttal or argument."). Without notice to the Church and an opportunity for the Church to place rebuttal evidence into the record, a finding based solely on a one-sided allegation cannot be made, and certainly cannot be raised to the level of a disqualifying misrepresentation.

**KFUO's Arrangement with Concordia Seminary (Paragraphs 51-65)**

14. The NAACP's proposed findings about KFUE's arrangement with Concordia Seminary in paragraphs 51-65 of its proposed findings make no real attempt to describe the relationship. Instead, the NAACP launches an attack on the low number of minorities at the Seminary and then attempts to construct on that basis an argument about the purported discriminatory nature of the relationship between KFUE and the Seminary. This argument

does not belong in findings. More important, the argument has no merit.

15. The NAACP's statistics about minority enrollment at the Seminary focus only on African-Americans and are therefore misleading. In the Fall quarter of 1989, there were at least ten minority students at the Seminary. NAACP Ex. 30.

16. The NAACP's statistic in paragraph 56 of its Findings and Conclusions concerning the use of Seminary students at KFUD is also misleading because it lumps together full-time employees and Seminary students who participated in a part-time work/study program. The part-time interns generally worked only 6-12 hours a week. Church Ex. 3 at 4; Church Ex. 4 at 22-23.

17. The NAACP's argument in paragraph 56 of its Findings and Conclusions that the use of Concordia students and wives was "in effect" a set-aside of positions for a white group is an inference based on nothing and constitutes an unfair attack on the recruiting practices of the Seminary itself, which is not a party to this proceeding. Unless there is some reason to believe that the Seminary discriminated in the selection of its students on the basis of race -- a scurrilous charge with absolutely no basis in the record -- there is no excuse for characterizing KFUD's use of Seminary students as grounded in any way on issues of race. As explained in the Church's findings, the Seminary students' work at KFUD was a part of their overall education as ministers. Church Ex. 7 at 6; see also Tr. 852-53. Insofar as the NAACP is arguing that the Church could not conduct such an educational program unless and until the Seminary had some number



of minorities mandated by the Government or the NAACP, its argument would raise grave constitutional questions about government interference with the Church's freedom to train its clergy in modern forms of ministry.

18. In paragraph 57 of its proposed findings, the NAACP appears to question the bona fides of KFUE's work/study program because the Seminary students received small pay for their work and were not merely volunteers. The cases cited in the Church's Findings and Conclusions at Note 53 show that this is a specious argument.

19. Contrary to the NAACP's contention in paragraphs 58-65, the Church has not changed its explanation of its arrangement with the Seminary in various pleadings, nor is there anything untoward about the Church's explanation. The Church has consistently explained that KFUE and the Seminary each play an integral role in the achievement of the other's goals. See the voluminous citations in the Church's Findings and Conclusions at 13-18. The Church has also been consistent in explaining that the mutual benefits of the arrangement included rent-free studios for KFUE on the Seminary campus and the opportunity for Seminary students and their wives to train in the use of radio as a medium in the Church's ministry. Thus, the passage in the Church's February 23, 1990 Opposition quoted by the NAACP in paragraph 58 of its proposed findings explicitly states that the arrangement existed because (1) the Seminary had permitted KFUE to remain on its campus on a rent-free basis; and (2) the arrangement "included reciprocal efforts by KFUE to provide broadcast

training to Concordia students or their spouses through employment at the stations." Church Ex. 4, Att. 7, at 17. The NAACP is wrong to pretend that this second point is not in the February 1990 Opposition. See id. Similarly, both of these points are contained in the Church's direct case. Thus, contrary to the NAACP's contention in paragraph 61 of its proposed findings, the Church has not "abandoned" either of these points. See paragraphs 28, 32, and 33 of the Church's Findings and Conclusions for both of these points and citations to the record in support of both points.

20. The NAACP misses the mark when it attacks in paragraph 61 of its proposed findings the legitimacy of the argument that KFUE was benefitted by not having to pay rent. As shown in the financial statements of KFUE (Church Ex. 4, Att. 5), KFUE was treated as a separate entity for financial purposes. The financial statements show no rental payments to the Seminary, thereby allowing KFUE to show lower operating deficits during the License Term. The NAACP does not and cannot show that this did not benefit KFUE.

21. The NAACP also errs in criticizing, in paragraphs 64 and 65 of its proposed findings, KFUE's statement that it used Seminary students because they were willing to work for low salaries. Church Ex. 7 at 6; see also Church Ex. 4 at 6; Tr. 487. Contrary to the NAACP's suggestion, Dennis Stortz, as Operations Manager of KFUE for the entire License Term, was surely competent to make this statement. Indeed, the NAACP is wrong when it argues that Mr. Stortz had no basis for his

testimony. Mr. Stortz testified that he in fact knew what some other stations paid. Tr. 487-88. Moreover, it is hard to dispute that a work/study program involving part-time work for students is less expensive than hiring full-time announcers.

22. The Church is mystified by the NAACP's contention in paragraph 65 of its findings that the Church's belief that Seminary students would be willing to work part-time for low pay as part of a work/study program is somehow based on an "embedded stereotype that African-Americans would be more discouraged by low pay than Whites." There is no evidence whatsoever that the belief about Seminary students' willingness to work had any relation to the race of students, much less that it related to any judgment by the Church about African-Americans' willingness to work for low wages.

**Job Qualifications for Certain Positions at KFUD (Paragraphs 66-106)**

23. The NAACP's attack in paragraphs 66-106 of its proposed findings on the bona fides of the job requirements for persons filling certain jobs at KFUD is largely predicated on the contents of job descriptions which were dumped into the record by the NAACP as its Exhibits 36, 37, 39, 40 and 41. The NAACP did not ask any of the Church's witnesses questions about the adoption of these job descriptions or their contents. As discussed in ¶ 3, supra, the NAACP's speculation about the significance of documents about which it asked no questions is a fatal deficiency throughout the NAACP's proposed findings. Here,

the NAACP has introduced KFUD's position descriptions into the record, asked no questions about the documents at hearing, and then concocted arguments that these documents somehow show discriminatory animus. This is totally unfair. If the NAACP believed that the documents had some significance as evidence of discriminatory actions, it surely had an obligation to ask about the matter and to give the Church the opportunity to respond with rebuttal evidence.

24. This is not an academic issue. The NAACP has relied heavily on its own sinister interpretations of job descriptions such as those for "Manager, FM Business Affairs," "Receptionist (Business Manager)" and "Receptionist (Business Services)" which the evidence would show were for positions which existed only on paper -- KFUD never recruited for these positions or filled them during the License Term. As for the position descriptions for "FM Program Director" and "Chief Engineer," the same person held these positions throughout the License Term. Again, these descriptions were not used in any actual hires and had no bearing on KFUD's hiring practices. If the NAACP had asked about any of these position descriptions, it would have learned that they were completely irrelevant to KFUD's hiring during the License Term and therefore no inferences can be drawn from them. Surely the NAACP is not arguing that the language of position descriptions which were never used, and about which there is no evidence as to why certain qualifications were listed as desirable or essential, have any significance in this case.

25. As to the NAACP's more specific contentions about KFUE's employment qualifications for certain positions, paragraphs 70-80 of the NAACP's proposed findings consist of second-guesses about the Church's judgments as to which positions required religious knowledge, training or expertise. For the reasons stated in paragraphs 130-147 of the Church's proposed conclusions of law, this kind of scrutiny of the Church's judgments unconstitutionally chills its rights under the First Amendment and is inconsistent with national policy as enunciated by Congress.<sup>2/</sup>

26. Turning to the Church's desire that certain employees have a knowledge of classical music, the NAACP acknowledges without criticism the Church's statements that (a) this job qualification did not in any way affect KFUE's willingness to recruit minorities; and (b) no minority applicant was ever rejected for any position at KFUE-FM because he or she lacked knowledge of classical music. NAACP's Findings and Conclusions at 40. Faced with this proof that KFUE never discriminated, however, the NAACP concocts a theory about an elaborate "scheme"

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<sup>2/</sup> It should be noted that the NAACP errs in placing significance in paragraph 75 of its proposed findings on a purported inconsistency between Dennis Stortz's testimony that Church membership was considered desirable for receptionists and the position descriptions for two receptionist slots -- Receptionist (Business Manager) and Receptionist (Business Services). There is no evidence that Mr. Stortz had anything to do with drafting these descriptions. Moreover, as described above, these position descriptions related to "paper" positions that were never filled. It is therefore of no significance that Mr. Stortz may not have realized that Church membership was not listed as a desirable qualification in these descriptions.

by the Church which purportedly served to dissuade minorities from applying at KFUD. See NAACP's Findings and Conclusions at 40-41. This is an outlandish charge. Nowhere in the meandering discussion beginning at paragraph 83 of the NAACP's Findings and Conclusion is there one shred of evidence of a "scheme." There was neither witness testimony nor documentary evidence which even arguably showed that Reverend Devantier or Reverend Dr. Bohlmann or Dennis Stortz ever took steps to deter minorities from applying to the stations. The NAACP's proposed findings do not even discuss any facts supporting the existence of such a purported "scheme." Instead, they attempt to show (unsuccessfully) that KFUD failed to engage in a sufficiently extensive outreach effort for minorities. The Church will respond to the NAACP's distortions of the record on an item by item basis herein. The main point remains, however, that the NAACP's general charge about a "scheme" is without any basis in the record evidence and is truly outrageous.

27. Paragraphs 83-94 of the NAACP's Findings and Conclusions consist of an incomplete and therefore misleading series of descriptions of an Opposition filed by Arnold & Porter on behalf of KFUD in February 1990. The point of this rambling discussion is apparently contained in paragraphs 92-94, where the NAACP points to purported differences between Table Two to that Opposition and KFUD's internal job descriptions. The purported differences are, however, either wrong or of no significance. In paragraph 92, for example, the NAACP claims that the internal job description of the Chief Engineer had a religious "requirement,"

but the NAACP's own chart (on page 36 of its findings) shows that the description stated that it was merely an "other desirable" characteristic. This is a curious error for an organization that has accused the Church of misrepresentation for similarly referring to a preferred applicant characteristic as a "requirement." See NAACP's Findings and Conclusions at 110-23. The NAACP also points in paragraph 92 to two positions (i.e., Chief Engineer and Technician) for which KFUD never hired anyone during the License Term. KFUD can neither have discriminated nor failed to recruit minority applicants for hires that never occurred. Does the NAACP really intend to maintain that these documents -- about which it never asked any questions and never gave the Church witnesses a chance to comment -- are competent evidence of some nefarious "scheme" on the part of the Church? The NAACP's comments on the job descriptions in KFUD's files are inaccurate and pointless.

28. In paragraph 93, the NAACP notes that seven lower level position descriptions were not included in a list of Top Four jobs in the February 1990 Opposition. The Church is baffled by this supposed criticism. The chart explicitly listed only Top Four jobs, and there was no obligation that it somehow also list lower level positions.

29. The NAACP also argues that certain of the lower level position descriptions did not explicitly list "religious-related duties," although they contained job requirements for knowledge of Church affairs or doctrine. Again the Church is mystified. Is the NAACP criticizing the drafting of internal personnel

documents and arguing that they were imperfectly done? The NAACP asked no questions whatsoever about these documents and can engage only in the most wild sort of speculation as to why a duty was or was not included in a description.

30. In paragraph 94, the NAACP again criticizes a purported omission of "theological job responsibilities" in certain of KFUDO's internal job descriptions. The problems with the NAACP's argument are numerous. To point to only the most obvious, some of these descriptions, as noted above, were never used during the License Term (e.g., Manager of FM Business Affairs). Moreover, it is pointless speculation to comment on descriptions of job duties -- what was included and what was not -- in the absence of questions addressed to a witness about the matter. One explanation is that someone at the Church simply failed to list each and every job function. This certainly happens in personnel offices. What would it show? Finally, it is just as improper for the NAACP to make judgments regarding the proper religious qualifications for KFUDO's employees as it is for the Commission to do so.

31. Paragraph 96 of the NAACP's findings does not state facts but instead launches an attack on the admissions policies of the Concordia Seminary. The NAACP argues that the Church has not affirmatively proven that the Seminary does not discriminate, and suggests that until the Church presents such proof, any recruitment from the Seminary is discriminatory. This assertion is outrageous and irresponsible. The Seminary is neither a licensee nor a party to this proceeding. See In re Applications



of The Lutheran Church/Missouri Synod, Memorandum Opinion and Order, FCC 94M-282 (released April 21, 1994), at 2 (KFUO is under no obligation to produce documents from Concordia Seminary).

Does the NAACP really mean to suggest that the HDO placed the Church on notice that the Seminary's admissions policies were in issue? As noted above, insofar as the NAACP is arguing that the Church could not conduct an educational work/study program for Seminary students unless and until the Seminary had some number of minorities mandated by the Government or the NAACP, its argument would raise grave constitutional questions about government interference with the Church's freedom to train its clergy in modern forms of ministry.

32. Paragraphs 97-106 of the NAACP's findings contain a biased and incomplete description of an argument in a February 1990 Opposition filed by Arnold & Porter on behalf of the Church. Stripped to their essence, the NAACP's proposed findings are an unfair attack on the Arnold & Porter lawyer who made this argument, Marcia Cranberg. For example, the NAACP argues that no "experienced FCC practitioner" could have read a 1980 FCC Report and Order to mean what Ms. Cranberg argued that it meant in the Opposition. NAACP's Findings and Conclusions at 49. The NAACP also notes that it "has never heard of" any other law firm making the argument that the NAACP attempts to belittle. NAACP's Findings and Conclusions at 48 n.9. The NAACP's level of knowledge regarding the use of such an argument by other licensees is of course irrelevant to this case, and the NAACP's gratuitous comments about Ms. Cranberg -- as well as its

contentious and one-sided descriptions of her arguments -- should be disregarded. An objective description of the genesis and contents of the argument in question is contained in paragraphs 101-108 of the Church's Findings and Conclusions.

33. The NAACP suggests in paragraph 103 of its proposed findings that it was somehow inconsistent for the Church to argue that it was difficult to find people in the general population of the St. Louis area to fill certain jobs when the Church also noted that it received a large number of qualified "write-in" applicants each year from throughout the United States. This is not inconsistent. As Arnold & Porter explained in the February 1990 Opposition, the reason for the large number of nationwide write-in applicants was that "because there are relatively few classical music or Lutheran religious stations in the country, those persons with a particular expertise in classical music, or Lutheran background, actively solicit positions at stations such as KFUD." Church Ex. 4, Att. 7, at 16-17. This has nothing to do with the relative rarity of such expertise in any particular market (such as St. Louis). Once again, the NAACP imagines a contradiction.

**KFUD's EEO Practices (Paragraphs 107-112)**

34. In paragraph 110 of its proposed findings, the NAACP states that KFUD posted Position Guides when jobs were open and that these descriptions "frequently" contained references to "religion-based" job qualifications. Assuming that the NAACP means knowledge of Lutheran doctrine by the term "religion-

based," the Church does not disagree with this statement and comments only that these postings were perfectly legal. The NAACP's hidden agenda in making this finding emerges, however, in paragraph 309 of its conclusions. There, the NAACP concocts a fantasy about an African-American who was not a Lutheran who walked into KFUD's offices. According to the NAACP, this fantasy person would "have seen African-Americans holding no responsible positions." We suppose that the NAACP can postulate anything it wants in its own fantasy world, but how does the NAACP know who its fantasy applicant would have encountered? Couldn't he or she have met Lula Daniels? Couldn't he or she have met Caridad Perez? Couldn't he or she have met Helen Richardson, or Lisa Harrison, or Cynthia Blades? The Church certainly believes that all of these people (and many more) held "responsible" positions at KFUD.

35. The NAACP then adds to its fantasy that the African-American "would have read openly discriminatory position guides mere (sic) posted on the wall." NAACP's Findings and Conclusions at 134. By "openly discriminatory," the Church assumes the NAACP is asserting that the Church had no right to require knowledge of Lutheran doctrine for any job at KFUD. For reasons stated in full in the Church's proposed conclusions, however, acceptance of this position would require the Commission to violate the First Amendment in the grossest possible fashion. If the NAACP is stating that KFUD racially discriminated in its hiring, then it is simply wrong -- the unrebutted evidence showed that KFUD hired minorities and that no past or then present employee or job

applicant complained that KFUD discriminated against him or her on the grounds of race or religion during the License Term. Church Ex. 7 at 10.

36. The NAACP acknowledges in paragraph 111 of its proposed findings that openings at KFUD were posted at the Church's International Center after the reorganization of KFUD in 1986. The NAACP also notes that the record evidence shows that the Center's employees were 11.5% minority. However, the NAACP refuses to give the Church credit for this recruiting step, and instead argues that the Church had some obligation to introduce into evidence the number of minorities working at the Center and the job title of each minority who worked there. See NAACP's Findings and Conclusions at 51-52. This is nonsense. The Church produced competent evidence about its recruiting efforts. If the NAACP wanted to argue (incorrectly) that these efforts were not significant, then it was the NAACP's job to impeach the evidence. The NAACP's lame argument about the International Center shows the lengths to which it has gone to unfairly demean the Church.

**The Church's Recruitment Procedures (Paragraphs 113-155)**

37. In paragraph 113 of its proposed findings, the NAACP implies that the chart contained in Attachment 6 to Church Exhibit 4 identifies each and every source that was used in recruiting for each opening during the License Term. In fact, the chart contains only those sources which the Church was able to document in a case designated over a decade after the beginning of the License Term. There almost certainly were other

sources used which the Church has not been able to document because of the lapse of time. See Church's Findings and Conclusions at 104.

38. For the reasons stated in Note 53 to paragraph 166 of the Church's Findings and Conclusions, the focus of this case should be full-time hires. As shown in that footnote, the NAACP's attempt in paragraph 114 of its Findings and Conclusions to lump efforts to recruit part-time participants in a work/study program at Concordia Seminary with recruitment of full-time employees is misleading and raises grave First Amendment issues. Using a proper analysis, the Church established with record evidence that it sought referrals for at least 26 of 43 full-time hires over the course of the License Term, or over 60%. Church Ex. 4, Att. 6; Church's Findings and Conclusions at 103-04.

39. Paragraphs 115-122 of the NAACP's proposed findings consist of a series of inaccurate and misleading criticisms of KFUE's use of various publications in its recruiting efforts. The statistics in these paragraphs are misleading because (among other things) they artificially divide the License Term into two periods (the periods before and after the filing of KFUE's renewal applications), and artificially attempt to separate KFUE-FM from KFUE(AM) in commenting on KFUE's use of recruiting sources. See, e.g., NAACP's Findings and Conclusions at 53-55.<sup>3/</sup> All hiring at KFUE was done pursuant to a single EEO

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<sup>3/</sup> The statement in paragraph 122 of the NAACP's Findings and Conclusions that no advertising was done in general circulation sources for positions at KFUE(AM) is, in any  
(continued...)

plan, and this separation of the two stations is therefore misleading. The NAACP states that "there is no indication" that advertisements in certain publications caused minorities to apply for jobs at KFUD (NAACP's Findings and Conclusions at 53), but the truth is that there is no conclusive evidence one way or the other. Also, the NAACP's claim in Note 16 to paragraph 119 that there is no evidence that a certain ad in Broadcasting Magazine ever ran is nonsense. The Church's letter to Broadcasting Magazine requesting that the ad be published is in the record in Church Ex. 4, Att. 9. If the NAACP had doubts as to whether the ad appeared as requested, it should have probed the issue.

40. The NAACP's criticisms in paragraphs 120 and 121 are based on claims about evidence that the Church did not introduce, or matters that the Church allegedly did not "explain," relating to KFUD's policy of putting EEO notices in advertisements, and its use of The Lutheran Witness as a recruiting tool. However, the Church put into the record competent evidence that its policy was to put EEO notices in ads and that certain omissions in ads were inadvertent. Church Ex. 4 at 12. Dennis Stortz was competent to testify about ads in The Lutheran Witness and did so. Church Ex. 4 at 12. Again, if the NAACP questions this evidence it should have tried to impeach it. The NAACP has not pointed to any impeaching evidence, however, and therefore cannot legitimately criticize the Church's evidence at this late date.

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<sup>3/</sup>(...continued)

case, wrong. To cite only one example, the ad in Broadcasting Magazine in Church Ex. 4, Att. 9, at 1, is for a General Manager at KFUD (AM).

41. In paragraphs 123-131 of its proposed findings, the NAACP describes in a non-objective and argumentative fashion certain efforts by FM General Manager Thomas Lauher to recruit minorities. These efforts are described in an objective fashion in the Church's Findings and Conclusions at 38-39 and 49-52. See Church Exhibit 6; Tr. 134, 140, 184, 188-89.<sup>4/</sup>

42. In paragraphs 132-139, the NAACP argues that KFUD's recruitment efforts did not become more vigorous in 1989 than they had been in prior years during the License Term.<sup>5/</sup> The NAACP is wrong. To point to only the most obvious examples, the letters to at least ten local universities and personnel agencies and the use of the Lutheran Employment Project in 1989 represented new and enhanced efforts to recruit minorities. Church Exhibit 4, Att. 14; see Church's Findings and Conclusions at 50-52.

43. The NAACP's argument in paragraphs 141-148 is apparently that the Church should have re-assigned recruiting functions at KFUD to its Commission on Black Ministry. The purpose of the Commission on Black Ministry, however, was to expand the Church's African-American membership, not to handle KFUD's employment matters. Church Ex. 2 at 3. The NAACP's ideas

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<sup>4/</sup> The attack on Mr. Lauher and the argument in Note 18 to paragraph 123 of the NAACP's Findings and Conclusions to the effect that his testimony was somehow "tainted" is meritless. The NAACP made the same charges in its Motion to Enlarge Issues in this case, and the Church showed that the allegations were baseless in its Opposition to that motion.

<sup>5/</sup> Paragraph 140 of the NAACP's proposed findings relates to activities after the end of the License Term and should be stricken or disregarded as irrelevant.

about a re-design of the Commission on Black Ministry have no relevance to this case. The NAACP also complains that KFUD did not use the Lutheran Employment Project for job referrals prior to 1989. The CEO of KFUD, Reverend Devantier, expressed regret that KFUD had not done this at an earlier date. Church Ex. 7 at 11.<sup>6/</sup>

44. Paragraph 150 presents a confusing and biased picture of KFUD's use of the Lutheran North St. Louis Outreach in January 1990. For a straightforward and objective description, the Church refers the Presiding Judge to paragraph 87 of its proposed findings (citing Church Ex. 11 at 1-2; Tr. 540, 1095). Contrary to the NAACP's suggestion in paragraph 150, the fact that the Church did not list this outreach effort in Attachment 6 to Church Exhibit 4 of its direct case shows nothing about whether it happened. The Church did not list the North St. Louis Outreach in that hearing exhibit because the effort did not result in any referrals of actual applicants, not for some sinister reason fabricated by the NAACP.

45. In paragraph 154 of its proposed findings, the NAACP makes a partial description of a "New Employee Data Summary" which it dumped into the record but about which it asked no questions. There is no justification whatsoever for the NAACP's characterization of this document as part of a "dossier . . ." with stigmatizing material which would come back to haunt anyone

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<sup>6/</sup> Paragraph 149 of the NAACP's proposed findings relates largely to activities after the end of the License Term and should be stricken or disregarded as irrelevant.



eventually seeking a promotion." See NAACP's Findings and Conclusions at 144. The NAACP has no evidence that the perfectly innocent data summaries had any such sinister function, and there is no such evidence. The NAACP's attempt to weave a tall tale about "dossiers" should be summarily rejected.

46. The NAACP makes similarly irresponsible charges concerning a rating form used for applicants for a position in January 1990.<sup>2/</sup> See NAACP's Findings and Conclusions at 66. As noted in the Church's proposed findings, this rating form was developed by KFUD employee Angela Burger, who brought the form with her from a prior job and had not performed job interviews for KFUD prior to January 1990. Tr. 726-27; see Church's Findings and Conclusions at 53 n.31. Contrary to the NAACP's contention in paragraph 320 of its Findings and Conclusions, there is nothing sinister whatsoever about the use of a new rating form by a new interviewer of job applicants. Tr. 522-29. Indeed, the NAACP's use of this form as some sort of evidence of evil intent in maintaining sinister "dossiers" shows the lengths to which the NAACP has gone in its proposed findings to postulate evil intent in the most innocent documents.

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<sup>2/</sup> The rating form was received into evidence not for its truth, but only for the limited purpose of explaining certain testimony. Tr. 527 lines 4-13. Thus, it is improper for the NAACP to propose findings based on the rating form.